S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

CHASE BANK OF TEXAS, N.A., RESIDENTIAL FUNDING CORPORATION, BANK ONE TEXAS, N.A., THE BANK OF NEW YORK, and LASALLE BANK, N.A.,

Plaintiffs-Appellants,

v

GRANT THORNTON LLP and DOEREN MAYHEW & COMPANY, P.C.,

Defendants-Appellees.

UNPUBLISHED
June 10, 2003

No. 236237
Oakland Circuit Court
LC No. 00-026943-NZ

Before: Cavanagh, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Plaintiffs State Bank of Texas, N.A. (also referred to as Chase Bank), Residential Funding Corporation, Bank One Texas, N.A., The Bank of New York, and LaSalle Bank, N.A., appeal by right from an order granting summary disposition to defendants Grant Thornton, LLP, and Doeren Mayhew & Co., PC, pursuant to MCR 2.116(C)(8). We affirm.

I. Facts and Procedure

Plaintiffs bring this action for fraud and aiding and abetting fraud against the accountants for plaintiffs' borrower, Mortgage Company of America (MCA), to recover money that was lost by plaintiffs when MCA became bankrupt. MCA was in the business of originating, selling and servicing mortgages. Plaintiffs entered into an ongoing business relationship with MCA commencing in October 1997, when plaintiffs loaned funds to MCA and various MCA-related entities pursuant to "warehouse" loan funding agreements. The loans were pledged with the intent that the loan proceeds would finance MCA's mortgage banking operations. Defendants, two accounting firms, jointly conducted annual audits of MCA and five of MCA's related entities, for the fiscal years between 1993 and 1998. Defendants' final audit of MCA's related entities was on January 31, 1998, and no audit reports or opinions were issued regarding MCA after January 1998. In early 1999, MCA and its related entities collapsed, became bankrupt, and defaulted on outstanding obligations to plaintiffs and other creditors. Plaintiffs suffered substantial financial loss upon MCA's collapse.

Plaintiffs' amended complaint alleges that plaintiffs' loss was caused by defendants' willful or reckless misrepresentation of the actual financial condition of MCA in their audit reports between 1993 and 1998, thereby fraudulently inducing plaintiffs to loan millions of dollars to MCA. Defendants filed a motion for summary disposition of plaintiffs' amended complaint, claiming that plaintiffs failed to state a cause of action pursuant to MCR 2.116(C)(8) and MCR 2.112(B)(1). The trial court granted summary disposition in favor of defendants.

II. Analysis

On appeal, plaintiffs argue they properly pleaded their claim for fraud with sufficient specificity. We disagree.

This Court reviews de novo the trial court's ruling on a motion for summary disposition pursuant to MCR 2.116(C)(8). *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). Motions brought under MCR 2.116(C)(8) test the legal sufficiency of the claim with regard to the pleadings alone. *Id*. All well-pleaded facts are accepted as true and are construed in a light most favorable to the nonmoving party. *Butler v Ramco-Gershenson, Inc*, 214 Mich App 521, 534; 542 NW2d 912 (1995). "Summary disposition under MCR 2.116(C)(8) is proper when the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery." *Corley v Detroit Bd of Ed*, 246 Mich App 15, 18; 632 NW2d 147 (2001), lv held in abeyance 654 NW2d 329 (2002), quoting *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998). Mere conclusions unsupported by allegations of fact will not suffice to state a cause of action under MCR 2.116(C)(8). *Butler*, *supra* at 534. Under MCR 2.112(B)(1), "[i]n allegations of fraud or mistake, the circumstances constituting fraud . . . must be stated with particularity."

The elements of a fraud claim are well settled:

> (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. [*Kassab v Michigan Basic Prop Ins Ass'n*, 441 Mich 433, 442; 491 NW2d 545 (1992), citing *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976), quoting *Candler v Heigho*, 208 Mich 115, 121; 175 NW 141 (1919).]

In *DiLeo v Ernst & Young*, 901 F2d 624, 627 (CA 7, 1990), the Seventh Circuit Court of Appeals stated the following regarding a claim of fraud under FRCP 9(b), the federal counterpart to MCR 2.112(B)(1):

> [FRCP] 9(b) requires the plaintiff to state 'with particularity' any 'circumstances constituting fraud.' Although states of mind may be pleaded generally, the 'circumstances' must be pleaded in detail. This means the who, what when, where, and how: the first paragraph of any newspaper story.

These same pleading requirements exist under MCR 2.112(B)(1).

The amended complaint in the present case does not plead fraud with the requisite specificity, and instead pleads general conclusory statements alleging that defendants misrepresented MCA's financial condition. For example, the amended complaint fails to sufficiently set forth specific facts showing that defendants knew the financial representations were false or that they intended to make plaintiff rely on the representations. As noted in *DiLeo, supra* at 629:

> The complaint does not allege that [the accountants] had anything to gain from any fraud by Continental Bank. . . . [The accountants'] partners shared none of the gain from any fraud and were exposed to a large fraction of the loss. It would have been irrational for any of them to have joined cause with Continental. . . . The complaint does not come close. It does not identify any of [the accountants'] auditors or explain what that person might have to gain from covering up Continental's wrongs. . . . What the [plaintiffs] needed to show, if not that [the accountants] had something to gain from deceit, was at least that [the accountants] knew that particular loans had gone bad and could not be collected.

Similarly, in the present case, plaintiffs offered merely the "conclusory" statements that defendants fraudulently misrepresented the financial position of MCA with the intent that plaintiffs would rely on the misrepresentations.

Moreover, the substance of plaintiffs' allegations is negligence rather than fraud. "If a [litigant] attempts to characterize a malpractice claim as a fraud or other type of claim, a court will look through the labels placed on the claim and will make its determination on the basis of the substance and not the form." *Brownell v Garber*, 199 Mich App 519, 532-533; 503 NW2d 81 (1993). It is the substance of the claim, which must be scrutinized. *US Fidelity & Guar Co v Citizens Ins Co of America*, 201 Mich App 491, 494; 506 NW2d 527 (1993). The amended complaint in the present case refers to defendants' "unqualified opinions" regarding MCA's audited financial statements, and it states that if defendants had properly followed GAAS and GAAP, the audited financial statements would have revealed MCA's fraudulent conduct. The amended complaint actually specifies the accounting standards that defendants allegedly failed to meet under GAAP and GAAS. Thus, the substance of the claim in the present case is negligence, not fraud. We view plaintiffs' focus on defendants' representations regarding the quality and standard of their work as an attempt to depict a negligence claim as a fraud claim.

As a claim for professional negligence, the Michigan Accountant Liability Act, MCL 600.2962, which limits defendants' liability to three possible situations, specifically barred plaintiffs' suit. Under subsection (a) of the act, liability may be imposed if the claimant is the accountant's client; under (b), liability may be imposed if the action is grounded upon "fraud or an intentional misrepresentation"; and under (c), liability may be imposed where the accountant was "informed in writing by the client at the time of the engagement that a primary intent of the client was for the professional public accounting services to benefit or influence the person bringing the action for damages." In the present case, plaintiffs were never defendants' clients, and plaintiffs did not allege the existence of a writing sufficient to meet the requirements of the act, thus liability cannot be imposed on defendants under subsections (a) and (c). Because this is an action for professional negligence, and not fraud, liability also cannot be imposed on defendants in the present case under subsection (b) of the act.

This case is analogous to *Yadlosky v Grant Thornton*, 120 F Supp 2d 622 (ED Mich, 2000), where the court dismissed a negligent misrepresentation claim brought by a non-client against defendants arising out of the same group of audits involved in the present case. The federal district court found that there was no basis for liability under Michigan's Accountant Liability Act. In *Yadlosky*, the plaintiff, an investor who purchased securities from MCA, alleged that he was deceived into the purchases by "false and misleading" financial statements prepared by the defendant accounting firms; that if the accountants had performed their duties in accordance with GAAS, MCA's financial problems would have been disclosed to the investors; and the plaintiff, having relied upon these statements in making his investment decision, would not have lost his investment. Under a FRCP 12(b)(6) motion for failure to state a claim upon which relief can be granted, the court rejected the plaintiffs' arguments and found that they were barred by the act. *Yadloski, supra* at 634-635.

Likewise, in the present case, plaintiffs made similar allegations in the amended complaint, and claimed that a proper audit by defendants, following the standards set forth under GAAS and GAAP, would have revealed MCA's fraudulent activities to plaintiffs, and thus, plaintiffs would not have decided to loan funds to MCA, and would not have suffered any damages. Just as in *Yadlosky*, in the present case, plaintiffs' claim is barred by the act. In short, plaintiffs have not alleged fraud with the requisite particularity, and their claim appears to be a claim for professional negligence, and not fraud. Thus, defendants are protected under the Michigan Accountant Liability Act, MCL 600.2962. Accordingly, the trial court did not err in dismissing plaintiffs' claim under MCR 2.116(C)(8).[1]

Next, plaintiffs argue that defendants have "substantially assisted" MCA in its perpetration of fraud, and have therefore aided and abetted MCA's fraudulent conduct. We disagree. An essential element of a claim for aiding and abetting fraud is that the defendant provides "substantial assistance" to the fraudulent scheme. Restatement Torts, 2d, § 876(b). Under *Dileo, supra* at 628, the alleged abettor is required to have the same degree of scienter as the person committing the actual fraud. As previously discussed, plaintiffs have failed to demonstrate that defendants had or should have had any knowledge that MCA was engaged in fraudulent activity. We note that our analysis with regard to the "fraud" claim applies equally to the "aiding and abetting fraud" claim.

Plaintiffs also argue that the trial court erred in granting summary disposition pursuant to MCR 2.116(C)(8) on the grounds that "[p]laintiffs have presented no evidence that [d]efendants made any material representations that resulted in a loss to [p]laintiffs." Plaintiffs assert that evidence does not need to be presented in response to a motion under MCR 2.116(C)(8), because as stated in *Singerman v Muni Serv Bureau, Inc*, 455 Mich 135, 139; 565 NW2d 383 (1997), "[a] motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of a claim and is tested on the pleadings alone. All factual allegations must be taken as pleaded, as

[1] Although the trial court did not address the possibility that the fraud claim was actually a claim for negligence, it properly dismissed plaintiffs' claim. Where the right result is reached for the wrong reason, reversal is improper. *Hilgendorf v St John Hosp & Medical Ctr Corp*, 245 Mich App 670, 685 n 8; 630 NW2d 356 (2001); *Detroit v Presti*, 240 Mich App 208, 214; 610 NW2d 261 (2000).

well as any reasonable inferences that may be drawn therefrom." However, plaintiffs rely only on the trial court's use of the word "evidence" in its oral ruling. Although the trial court used the word "evidence," a review of the record reveals that the trial court did in fact apply the correct standard for deciding a motion for summary disposition, and on the correct elements required for stating a claim of fraud. The use of the word "evidence" by the trial court was actually in reference to the lack of factual allegations to support the fraud claim in the amended complaint.

Finally, plaintiffs add that the trial court erred in ruling that plaintiffs were required to allege a contractual relationship in the amended complaint, because a fraud claim does not require privity of contract. However, examination of the record reveals the learned trial judge was not referring to plaintiffs' complaint. The trial court was also ruling on a second motion to dismiss brought in a related case that arose out of the same audits that were performed by the same defendants in the present case. Both cases were dismissed on the same day as a result of a single ruling from the trial court. The second matter included a claim for negligent misrepresentation, which does require privity of contract. Therefore, the trial court's mention of the absence of a contractual relationship between the parties was not directed at plaintiffs in the present case.[2]

Affirmed.

/s/ Mark J. Cavanagh
/s/ Hilda R. Gage
/s/ Brian K. Zahra

[2] This Court recently affirmed the trial court's dismissal of the claims asserted against defendants in this related case. See *Bd of Trustees et al v Grant Thornton, LLP and Doeren Mayhew, PC,* unpublished opinion per curiam of the Court of Appeals, issued March 11, 2003 (Docket No. 236415).